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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

COYNESS L. ENNIX JR., M.D.,

Plaintiff,

vs.

ALTA BATES SUMMIT MEDICAL
CENTER,

Defendants.

Case No. C 07-2486 WHA

**PLAINTIFF'S MOTION IN LIMINE
NO. 6 TO EXCLUDE TESTIMONY
OF LELAND HOUSMAN, M.D.
AND ROBERT H. BREYER, M.D.;
DECLARATION OF RACHEL
SATER**

Trial Date: June 2, 2008

Dept: Ctrm. 9, 19th Floor

Judge: Hon. William H. Alsup

Plaintiff Coyness L. Ennix, Jr. ("Dr. Ennix") moves to exclude testimony Leland Housman, M.D. and Robert H. Breyer, M.D. National Medical Audit, the outside company that prepared a report regarding Dr. Ennix peer review, contracted with Drs. Housman and Breyer to perform chart review of the ten cases at issue. ABSMC designated Drs. Housman and Breyer to testify regarding the review process and their conclusions. Their conclusions ostensibly were represented in the report NMA provided to ABSMC ("NMA Report") in the course of the

1 challenged peer review. Drs. Housman and Breyer did not themselves testify before the AHC or
2 MEC. Therefore, ABSMC did not consider any testimony from Drs. Housman or Breyer during
3 the challenged peer review, with the exception of those opinions expressed in the NMA Report.
4 Accordingly, the only matter to which Drs. Housman and Breyer could testify with any relevance
5 to this suit is that the NMA Report accurately reflects their respective opinions. Any other
6 matters to which they might testify were not before ABSMC during the challenged peer review,
7 and therefore have no probative value regarding ABSMC's motivation or the veracity of its
8 proffered justification of protecting "patient safety." If such testimony has any probative value,
9 it is outweighed by the potential prejudice, confusion, and waste of time.

10 Therefore, the Court should exclude Drs. Housman's and Breyer's testimony as
11 irrelevant.

12 STATEMENT OF FACTS

13 Dr. Ennix claims that ABSMC discriminated against him based on his race in violation of
14 42 U.S.C. § 1981 in a peer review process conducted at the Summit campus. In its initial
15 disclosures, ABSMC stated that it would call Drs. Housman and Breyer as witnesses, asserting
16 that each "has knowledge of his own qualifications to conduct such a review, of the manner in
17 which the review was conducted (including his speaking with Plaintiff and considering
18 information provided by Plaintiff), and of the conclusions he reached concerning deficiencies in
19 Plaintiff's performance of his medical responsibilities." (See Sater Decl., ¶ 2, Exhibit A, at 7:1-
20 14.) Drs. Housman and Breyer did not take part in the peer review process other than by
21 providing opinions which were allegedly incorporated into the NMA Report. (Sater Decl., ¶ 3,
22 Exhibit B.)

23 ARGUMENT

24 The sole issue in this case is whether race was a factor in ABSMC's peer review actions
25 against Dr. Ennix that nearly ruined his career as a cardiac surgeon. This Court should exclude
26 testimony by Drs. Housman and Breyer, other than a statement that the NMA Report accurately
27 reflects their respective opinions, because any other testimony they might offer was not

1 considered by ABSMC in the course of the challenged peer review and therefore is not
2 probative. Evidence is admissible if it is probative as to a “fact of consequence” and its
3 probative value is not “outweighed by the danger of unfair prejudice, confusion of the issues, or
4 misleading the jury, or by considerations of undue delay, waste of time, or needless presentation
5 of cumulative evidence.” FRE Rules 401, 403. Opinions or evidence not considered by
6 ABSMC have no probative value regarding whether ABSMC’s actions regarding the current
7 peer review were justified by patient care concerns or were motivated by racial animus. On that
8 basis, Drs. Housman and Breyer’s testimony should be excluded.

9 Finally, even if Drs. Breyer’s and Housman’s testimony had any probative value in this
10 case, such minimal value would be outweighed by its potential for unfair prejudice and
11 confusion of the jury, which might mistakenly believe ABSMC had considered such testimony in
12 the course of its peer review, when in fact it did not. Further, presentation of this extraneous
13 evidence would unnecessarily waste time and delay conclusion of this case. For these additional
14 reasons, this Court should exclude such evidence.

15 CONCLUSION

16 For the foregoing reasons, Dr. Ennix respectfully requests that the Court exclude the
17 testimony of Drs. Housman and Breyer other than a statement that the MNA Report accurately
18 reflects their respective opinions.

19 Respectfully submitted,

20 Dated: April 29, 2008

MOSCONE, EMBLIDGE & QUADRA, LLP

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23 By: /s/
Rachel J. Sater

24 Attorneys for Plaintiff
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DECLARATION OF RACHEL J. SATER

I, Rachel J. Sater, declare:

1. I am an attorney licensed to practice law in the State of California and in this Court. I am an attorney at Moscone, Emblidge & Quadra, LLP, counsel of record for the Plaintiff.

2. Attached hereto as Exhibit A is a true and correct copy of relevant portions of ABSMC's initial disclosures in this case.

3. I am informed and believe that Drs. Housman and Breyer did not participate in Dr. Ennix's peer review except by way of the NMA Report. Attached as Exhibit B is a true and correct copy of relevant deposition testimony from Dr. William Isenberg (pages 69 and 70), confirming that there was no direct communication between ABSMC and Drs. Housman and Breyer.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge.

Dated: April 29, 2008

/s/
Rachel J. Sater

EXHIBIT B

10 Q So as far as Summit communication to NMA, it was
11 limited, as far as you know, to Dr. Kirk, yourself --

12 A Mr. Kirk. Mr. Kirk.

13 Q Mr. Kirk, yourself, Mr. Shulman, and Ms. Jellin
14 or her staff?

15 A And her staff, yes.

16 Q What about in the other direction? Who
17 communicated with Summit from NMA?

18 A I spoke with Dr. Smithline. I spoke with one of
19 his staff members who asked for a graph of off-to-pump-on
20 pump conversion rates. I think I was on a conference call
21 at least once that I can remember with Mr. Shulman,
22 Dr. Smithline, and myself. I can't really verify if they
23 had conversations.

24 Q Did you have conversations with Dr. Houseman or
25 Dr. Breyer?

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1 A I did not.

2 Q Are you aware of anyone at Summit of having
3 conversations with Doctors Houseman or Breyer?

4 A Dr. Ennix did.

5 Q Anyone else?

6 A To my knowledge, no. Well, maybe -- no. No.

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11 ALTA BATES SUMMIT MEDICAL CENTER

12 UNITED STATES DISTRICT COURT
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14 NORTHERN DISTRICT OF CALIFORNIA

15 COYNESS L. ENNIX, JR., M.D.,
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17 Plaintiff,

18 v.

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20 ALTA BATES SUMMIT MEDICAL CENTER,
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22 Defendant.

CASE NO. C 07-2486 WHA

**DEFENDANT'S OPPOSITION TO
PLAINTIFF'S MOTION IN LIMINE
NO. 6 TO EXCLUDE TESTIMONY
OF LELAND HOUSMAN, M.D. AND
ROBERT H. BREYER, M.D.**

DATE: May 19, 2008
TIME: 2:00 p.m.
DEPT: Ctrm. 9, 19th Floor
JUDGE: Hon. William H. Alsup

COMPLAINT FILED: May 9, 2007
TRIAL DATE: June 2, 2008

1 An outside review agency called National Medical Audit ("NMA") prepared
2 a critical review of Plaintiff that is central to Defendant's case. Plaintiff concedes that the
3 NMA report itself is relevant. But Plaintiff seeks to preclude the testimony of the
4 reviewers themselves "with the exception of those opinions expressed in the report."
5 Plaintiff's motion should be denied. To begin with, Defendant intends to introduce
6 evidence that the NMA reviewers did not know Plaintiff's race until well after the report
7 was prepared. This critical fact precludes any argument by Plaintiff that the report was in
8 any way racially biased, which is the primary issue in dispute.

9 More generally, it is important that the reviewers be able to explain fully
10 their underlying methodology—something that Plaintiff will most assuredly try and attack.
11 For example, on summary judgment Plaintiff argued that the conclusion of the NMA
12 report was "preordained" and he attempted to show numerous flaws in the report's
13 methodology. These criticisms included: (1) NMA did not interview any of the people
14 involved in the ten reviewed cases other than Ennix; (2) NMA did not interview Plaintiff
15 until "many weeks" into its work; (3) that NMA reached certain conclusions prior to
16 Plaintiff's interview; (4) that certain report "headings" were drafted prior to completing the
17 NMA investigation; (5) that NMA was in "constant contact" with Dr. Isenberg and the
18 Medical Staff attorney; (6) that NMA included "additional critical comments" at Dr.
19 Isenberg's urging; and finally (7) that NMA used "bogus statistics" to justify its
20 conclusions.

21 Because Defendant must be able to explain why these various criticisms
22 hold no water, everyone involved in the preparation of the NMA report must be able to
23 explain all facets of his participation. Specifically, Defendant must be able to explain
24 why the report's conclusions were not "preordained," but rather required by the
25 underlying evidence and the scientific method. Absent such evidence, Defendant will be
26 unable to demonstrate to the jury why the conclusions of the NMA report are so
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1 persuasive. Accordingly, the Court should deny this motion in its entirety. Alternatively,
2 the Court should preclude Plaintiff from making any type of attack on the conclusions
3 reached by the NMA report.

4 DATED: May 9, 2008

KAUFF MCCLAIN & MCGUIRE LLP

6 By: 

7 ALEX HERNAEZ

8 Attorneys for Defendant
9 ALTA BATES SUMMIT MEDICAL
10 CENTER